



U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

April 14, 2024

Hon. Arun Subramanian
United States District Court
500 Pearl Street
New York, NY 10007

Re: United States v. Avraham Eisenberg, 23 Cr. 10 (AS)

Dear Judge Subramanian:

The Government writes to respond, briefly, to the defense's letter regarding the mixed swaps issue. Specifically, the Government writes to make sure the Court has all of the relevant law with respect to the funding rate issue, and it writes to clarify its position regarding whether the oracle for MNGO Perpetuals is a narrow-based security index.

First, with respect to the funding rate, the defense has argued that the funding rate is a narrow-based security index. An index is "an index or group of securities, including any interest therein or based on the value therefrom." 15 U.S.C. § 78c(a)(68)(E). The defense now asserts that a funding rate is an index not because it is an "index or group of securities," but rather because it is an "*interest* therein or based on the value therefrom." *Id.* (emphasis added).

This argument is plainly wrong because a rate, such as the funding rate, is not an "interest." This difference is clear in plain language and in the text of the Commodities Exchange Act and the securities laws. The plain meaning of an "interest" is a "right, title, or legal share in something." See "Interest," Merriam-Webster, *available at* <https://www.merriam-webster.com/dictionary/interest>. A "rate," by contrast, is "an amount of payment or charged based on another amount," or "a charge, payment, or price fixed according to a ratio, scale, or standard." See "Rate," Merriam-Webster, *available at* <https://www.merriam-webster.com/dictionary/rate>. The funding rate is (as the name suggests) a rate, not an interest: it is a flow of payments based on a differential between the oracle price and the midprice of the MNGO Perpetual order book, not a right, title, or share in something.

Consistent with the plain language, the securities laws (where the definition of "index" appears) use the word "interest" to refer to a right, title, or legal share in something, not a rate. For example, when defining exempted securities, the securities laws use the word "interest" to refer to ownership or participation rights in a type of asset. See 15 U.S.C. § 78c(12) (defining exempted security to "any interest or participation in any common trust fund," any "interest or participation in a single trust fund," or any "security issued by or any interest or participation in any pooled income fund"). Similarly, in defining the term "security," the securities laws include "certificates of interest." *Id.* § 78c(10). The securities laws do not call a rate an interest.

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